

T.P., Appellant

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL YARD, Portsmouth, VA, Employer**

Issued: May 23, 2022

Case Submitted on the Record

JANICE B. ASKIN, Judge

³ The Board notes that, following the April 9, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to modify a March 7, 2000 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On July 18, 1988 appellant, then a 30-year-old woodcrafter, filed a notice of traumatic injury (Form CA-1) claiming that on July 18, 1988 he injured his lower back when he moved pallets, desks, and boxes into storage while in the performance of duty. OWCP initially accepted appellant's claim for lumbosacral sprain and herniated lumbar disc at L4-5, and paid appellant wage-loss compensation for disability from work for various periods. On August 2, 1988 appellant underwent OWCP-authorized back surgery, including partial hemilaminectomy at L4-5 with excision of an L4-5 herniated nucleus pulposus with extrusion.

OWCP engaged in extensive development of the medical evidence, including referral of appellant in early-1999 for a second opinion examination with Dr. Richard T. Holden, a Board-certified orthopedic surgeon. On March 2, 1999 Dr. Holden opined that appellant could return to work with restrictions including lifting no more than 50 pounds and not engaging in vertical climbing.

OWCP referred appellant for vocational rehabilitation services, but he later elected to retire from federal employment effective March 1, 2000.

By formal LWEC decision dated March 7, 2000, OWCP found that appellant was not totally disabled from all work, but had the ability to work in the selected position of an estimator.⁴ It based appellant's wage-earning capacity on this position, and found that he had an LWEC of \$240.32 per week.

Following the March 7, 2000 decision, appellant only periodically treated with his attending physicians. In a September 12, 2006 report, Dr. Ran Vijai Singh, a Board-certified neurosurgeon, noted that appellant presented with a history of repeated episodes of falling when his legs would suddenly give out. He advised that a magnetic resonance imaging (MRI) scan revealed some mild disc protrusions at L2-3 and L3-4 on the left side, but he noted that they were not significant enough to explain the history of appellant's repeated falls.

In a February 28, 2012 report, Dr. Daniel E. Boyle, a Board-certified urologist, noted that appellant complained of sporadic enuresis, but no daytime episodes of incontinence. He diagnosed unique bladder dysfunction. In a December 26, 2013 report, Dr. Angela Galdini, a Board-certified family medicine specialist, opined that appellant was permanently disabled due to chronic issues with rectal incontinence, insomnia, pain, muscle spasms, and dysesthesias in both lower extremities. Dr. Antonio Quidgley-Nevares, a Board-certified physiatrist, initially examined appellant on September 17, 2014. He assessed appellant with chronic pain disorder, chronic use

⁴ The estimator position, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 169.267-038, was found by a vocational rehabilitation specialist to be reasonably available in appellant's commuting area and was determined to be within his vocational and physical capabilities. The position involved estimating material and labor costs for various projects and was classified as a sedentary job, which required occasional lifting of up to 10 pounds.

of therapeutic opioids, post laminectomy syndrome of the lumbosacral region, and chronic lumbar radiculopathy.

In a March 9, 2015 report, Dr. Galdini indicated that appellant had suffered with constant, unrelenting incontinence since his July 18, 1988 injury and had not been able to work since 1991. On March 13, 2015 Dr. Quidgley-Nevares indicated that appellant reported he continued to have frequent falls, that his intermittent urinary incontinence was unchanged, and that he had daily suicidal ideation. He opined that appellant suffered from chronic back pain, radicular pain, and post laminectomy syndrome due to his July 18, 1988 injury. In early-2015 OWCP expanded the accepted conditions to include neurogenic bowel, neurogenic bladder, displacement of lumbar intervertebral disc without myelopathy and left thoracic or lumbosacral neuritis/radiculitis.

Appellant claimed that he sustained an employment-related recurrence of disability on March 8, 2015, which was denied by OWCP decision dated July 16, 2015. OWCP later determined that appellant was actually requesting modification of the March 7, 2000 LWEC determination and, by decision dated July 6, 2016, a representative of OWCP's Branch of Hearings and Review denied appellant's modification request.

On March 13, 2017 OWCP referred appellant for a second opinion examination and evaluation by Dr. James Schwartz, a Board-certified orthopedic surgeon. It requested that Dr. Schwartz evaluate the extent of appellant's work-related residuals and his ability to work. In an April 22, 2017 report, Dr. Schwartz reported physical examination findings and noted that on July 18, 1988 appellant sustained a large L4-5 disc herniation to the left side, with production of a lumbar L4-5 radiculopathy. He opined that appellant had pain residuals of the July 18, 1988 employment injury, including radiculopathy, and noted that his waxing and waning symptoms would prevent him from working. Dr. Schwartz provided an April 22, 2017 work capacity evaluation form (OWCP-5c), indicating that appellant could perform modified-duty work with restrictions.

By decision dated May 30, 2017, OWCP denied modification.

On June 5, 2017 appellant, through counsel, requested reconsideration of the May 30, 2017 decision and submitted a statement. By decision dated June 22, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On May 29, 2018 appellant, through counsel, again requested reconsideration of the May 30, 2017 decision. He submitted a May 17, 2018 report from Dr. Errol Liebowitz, a licensed clinical psychologist, who indicated that appellant had experienced five psychiatric hospitalizations since his July 18, 1988 employment injury. Dr. Liebowitz advised that appellant had anxiety and depression related to his lack of control over his medical symptoms and loss of sense of purpose. He opined that appellant could not work in the constructed position of estimator due to his severe pain and neurogenic bowel/bladder conditions, which rendered him unable to reasonably adhere to a set work schedule or perform any activity for a sustained period of time. Dr. Liebowitz also noted that medical documentation from attending physicians demonstrated that appellant had significant cognitive deficits that would impair his ability to work as an estimator. He diagnosed psychological and behavioral factors associated with diseases or disorders classified elsewhere, as well as the condition of other chronic pain, which he directly related to residuals of the July 18, 1988 employment injury. Dr. Liebowitz opined that appellant was unable to work in any capacity and was totally disabled from work not only due to the diagnoses presently accepted

for his July 18, 1988 employment injury, but also due to his consequential psychological diagnoses.

By decision dated August 28, 2018, OWCP denied modification of the May 30, 2017 decision.

On April 3, 2019 appellant, through counsel, requested reconsideration of the August 28, 2018 decision.

Appellant submitted an April 2, 2019 report from Dr. Liebowitz who opined that appellant was unable to work in any capacity and was totally disabled from all work. He indicated that this disability was due not only to appellant's accepted work-related physical conditions, but also was due to his consequential psychological diagnoses of major depression, pain disorder with related psychological factors, psychological and behavioral factors associated with diseases or disorders classified elsewhere, and other chronic pain. Dr. Liebowitz found that these psychological conditions were directly related to appellant's accepted physical conditions.

By decision dated May 21, 2019, OWCP denied modification.

On June 12, 2019 OWCP referred appellant for second opinion examination and evaluation with Dr. Louis K. Duchin, a Board-certified psychiatrist and neurologist. It requested that Dr. Duchin evaluate the extent of appellant's work-related residuals and his ability to work. In a July 8, 2019 report, Dr. Duchin discussed appellant's factual and medical history and reported the findings of his physical examination. He indicated that there was a relationship between appellant's July 18, 1988 employment injury and his accepted major depression and somatic disorder conditions. However, Dr. Duchin opined that Dr. Liebowitz' opinion was devoid of any mention of appellant's non-injury-related psychiatric events. He indicated that, without incorporating an accurate factual and psychiatric history, Dr. Liebowitz' opinion failed to sufficiently explain how appellant's claimed disability was due to a consequential psychiatric condition related to the July 18, 1988 employment injury as opposed to nonwork-related psychiatric factors/events. Dr. Duchin concluded that appellant's disability was related to psychiatric conditions unrelated to the accepted employment-related conditions. He noted, "[t]herefore no justification can be found for modification of the [March 7, 2000] wage[-]earning capacity decision."

By decision dated September 19, 2019, OWCP expanded the acceptance of the claim to include major depression and somatic disorder.

OWCP also issued a separate decision dated September 19, 2019, which superseded the May 21, 2019 decision. By this decision, it denied modification of its prior decisions denying appellant's request for modification of the March 7, 2000 LWEC determination. OWCP found that the weight of the medical opinion evidence with respect to whether appellant's injury-related condition prevented him from working as an estimator rested with the opinion of Dr. Duchin.

Appellant, through counsel, requested reconsideration of the September 19, 2019 decision and submitted a December 23, 2019 report from Dr. Liebowitz who discussed the second opinion report of Dr. Duchin and expressed his disagreement with the report. Dr. Liebowitz noted that he was perplexed that OWCP had not deemed appellant physically disabled despite the multitude of medical treatment providers who had indicated he was disabled. He opined that appellant was

totally disabled from a psychological perspective from returning to work “at this time and in the foreseeable future.” Dr. Liebowitz noted that OWCP had accepted appellant’s claim for major depression and somatic disorder, and explained that these conditions were disabling. He also indicated that appellant’s physical conditions, particularly his accepted bladder and bowel conditions, rendered appellant disabled.

By decision dated April 9, 2020, OWCP affirmed the September 10, 2019 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.⁶ An employee’s actual earnings generally best reflect his or her wage-earning capacity.⁷ Absent evidence that actual earnings do not fairly and reasonably represent the employee’s wage-earning capacity, such earnings must be accepted as representative of the individual’s wage-earning capacity.⁸ But if actual earnings do not fairly and reasonably represent the employee’s wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee’s usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.⁹

OWCP must initially determine the employee’s medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹⁰ The medical evidence OWCP relies upon must provide a detailed description of the employee’s condition and the evaluation must be reasonably current.¹¹ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee’s limitations from both injury-related and preexisting conditions, but not limitations attributable to post injury or subsequently acquired conditions.¹²

⁵ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁶ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁸ *Id.*

⁹ 5 U.S.C. § 8115(a); *MaryJo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁰ *M.A.*, 59 ECAB 624, 631 (2008).

¹¹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

¹² *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4c (June 2013).

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.¹³ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁴ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.¹⁵

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁷

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board first notes that appellant has not asserted that OWCP's original March 7, 2000 LWEC determination was, in fact, erroneous.¹⁸ Rather, appellant has asserted that his injury-related conditions had worsened to the point that he could no longer work in the constructed position of estimator. He alleged that this change in his injury-related conditions necessitated modification of the March 7, 2000 LWEC determination.¹⁹

The Board finds that there remains a conflict in the medical opinion evidence between Dr. Duchin, OWCP's referral physician, and Dr. Liebowitz, appellant's attending physician, regarding whether appellant has shown a material change in the nature and extent of his injury-related conditions, related to the July 18, 1988 employment injury, such that he could no longer work as an estimator.

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

¹⁴ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6 (June 2013).

¹⁵ 20 C.F.R. § 10.403(d); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁶ *C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁷ See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

¹⁸ See *supra* note 16.

¹⁹ See *id.*

appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.²⁰ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.²¹ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²²

Dr. Liebowitz opined in reports dated May 17, 2018, April 2 and December 23, 2019 that appellant was totally disabled due to his work-related conditions. In his May 17, 2018 report, he advised that appellant had anxiety and depression related to his lack of control over his medical symptoms and loss of sense of purpose.²³ Dr. Liebowitz opined that appellant could not work in the constructed position of estimator due to his severe pain and neurogenic bowel/bladder conditions, which rendered him unable to reasonably adhere to a set work schedule or perform any activity for a sustained period of time. He also noted that medical documentation from attending physicians demonstrated that appellant had significant cognitive deficits that would impair his ability to work as an estimator. Dr. Liebowitz diagnosed psychological and behavioral factors associated with diseases or disorders classified elsewhere, as well as the condition of other chronic pain, which he directly related to residuals of the July 18, 1988 employment injury. He opined that appellant was unable to work in any capacity.

In his April 2, 2019 report, Dr. Liebowitz opined that appellant was unable to work in any capacity and was totally disabled from all employment. He indicated that this disability was due not only to appellant's accepted work-related physical conditions, but also was due to his consequential psychological diagnoses of major depression, pain disorder with related psychological factors, psychological and behavioral factors associated with diseases or disorders classified elsewhere, and other chronic pain. Dr. Liebowitz found that these psychological conditions were directly related to appellant's accepted physical conditions. In his December 23, 2019 report, he discussed the second opinion report of Dr. Duchin and expressed his disagreement with the report. Dr. Liebowitz noted that he was perplexed that OWCP had not deemed appellant physically disabled despite the multitude of medical treatment providers who had indicated he was disabled. He opined that appellant also was totally disabled from a psychological perspective from returning to work "at this time and in the foreseeable future." Dr. Liebowitz noted that OWCP had accepted appellant's claim for major depression and somatic disorder, and explained that these conditions were disabling. He also indicated that appellant's physical conditions, particularly his accepted bladder and bowel conditions, rendered appellant disabled.

In contrast, in his July 8, 2019 report, Dr. Duchin opined that Dr. Liebowitz' opinion was devoid of any mention of appellant's noninjury-related psychiatric events. He indicated that,

²⁰ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

²¹ 20 C.F.R. § 10.321.

²² *S.S.*, Docket No. 19-0766 (issued December 23, 2019); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

²³ The Board notes that, on September 19, 2019, OWCP expanded the accepted conditions to include major depression and somatic disorder.

without incorporating an accurate factual and psychiatric history, Dr. Liebowitz' opinion failed to sufficiently explain how appellant's claimed disability was due to a consequential psychiatric condition related to the July 18, 1988 employment injury as opposed to nonwork-related psychiatric factors/events. Dr. Duchin concluded that appellant's disability was related to psychiatric conditions unrelated to the accepted employment-related conditions. He noted, "[t]herefore, no justification can be found for modification of the [March 7, 2000] wage[-]earning capacity decision."

Because there remains an unresolved conflict in medical opinion regarding appellant's injury-related disability, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the medical record and a statement of accepted facts, to specialists in the appropriate fields of medicine for an impartial medical examination to determine whether appellant's work-related conditions have worsened to the point that he can no longer work in the constructed position of estimator. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's request for modification of the March 7, 2000 LWEC determination.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 23, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board